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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 745

PEARL G. MARTUFI, *Petitioner*

v.

ROBERT C. FRASER

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PEARL G. MARTUFI, *Petitioner*

v.

ROBERT C. FRASER

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### OPINIONS BELOW

The judgment of the Court of Appeals (App., 3a), in case No. 16,855, affirming, *per curiam*, the judgment of the District Court (App., 4a), is not reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1962 (App., 3a). Jurisdiction to review this judgment is conferred upon this Court by 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The questions presented for review are:

I

Whether a District Court is barred from granting a second motion for summary judgment which is grounded upon facts identical to those which had been raised, and had been considered and rejected by that Court when it denied, some fifteen months earlier, a first motion for summary judgment in the same case; and,

II

Whether contradictory averments, presented by affidavit and deposition, which raised unresolved disputes regarding the occupational relationship of the parties, and the scope of respondent's employment, presented genuine issues of material fact which were not susceptible to adjudication, as a matter of law, by an order granting summary judgment; and,

III

Whether absolute immunity from civil suit for damages arising from an alleged libel can be conferred upon a Federal employee working in the lowest echelons of government service, when no competent evidence has been offered to support the theory that the act complained of was a matter committed by law to his control and supervision.

## STATUTES AND RULES INVOLVED

The statutes and rules which this case involves, set forth in the Appendix 1a, hereto, *infra*, are as follows:

1. Federal Rules of Civil Procedure, Rules 56(b), (c), (e).

2. District of Columbia Code (1961 Ed.), § 11-306.

3. United States Code, Title 28, Sections 1291 and 1254(1).

## STATEMENT OF THE CASE

On December 4, 1959, petitioner, a Visual Information Specialist employed by the U. S. Information Agency, filed a Complaint against the respondent, also a Visual Information Specialist for the U. S. Information Agency, in which she charged that she had sustained damages as the result of certain allegedly false and defamatory statements contained in memoranda written and published by the respondent. The text of these memoranda are contained, *verbatim*, in the body of the Complaint, *infra* (R. 4-6).

On January 5, 1960, petitioner filed an Affidavit in which she stated that respondent exercised no supervisory authority whatsoever over her in the course of her employment, and that the respondent was not charged in any manner whatsoever, in the course of his employment, with the duty, responsibility or power to evaluate, decide upon, or express opinions regarding the quality or any other details pertaining to, the petitioner's occupation.

On June 8, 1960, respondent filed an Answer to Petitioner's Complaint in which he alleged, *inter alia*, that "he was the immediate supervisor of and shared an

office with the plaintiff", that he had prepared the memoranda which formed the basis for petitioner's Complaint, that he disclosed the contents, substance and existence thereof to no one except Mr. Smith (the common supervisor of petitioner and respondent) and to his (Mr. Smith's) deputy section chief (Mr. Clark), and that he subsequently destroyed the rough draft of that memorandum. (R. 9, 10) Respondent also answered that he was petitioner's supervisor from August 20, 1959, until January 4, 1960. (R. 9)

On June 28, 1960, respondent testified on deposition that he could not remember whether he had gone to work for the U. S. Information Agency on August 20, 1959, or September 20, 1959 (R. 12), that his job title was "Information Specialist, (Photographer)" (R. 12), that he held that position from the date he had gone to work with the U. S. Information Agency until the date of the deposition (R. 12); that he did not recall whether his job description contained any reference to his acting in a supervisory capacity over petitioner (R. 13), that nothing appeared in writing with regard to his being designated a Unit Chief upon his arrival at the U. S. Information Agency (R. 14), that he was never, at any time, charged with the responsibility for composing efficiency reports for any of the people who, he testified, reported to him (R. 14), that he was not acquainted with the Civil Service Regulations regarding efficiency reports (R. 14), that he had prepared the memorandum quoted in the Complaint filed by the petitioner against him (R. 16), that he had received no help whatsoever in the preparation of that memorandum (R. 16), that no one else, apart from his supervisor, Mr. Smith, had participated in a revision of the memorandum (R. 16), that he recalled

taking the rough draft home with him, and throwing it in the trash (R. 22), that he did not consider that his job description adequately outlined what his official duties were, as far as his position was concerned (R. 23), that he could not say whether his job description outlined fully the scope and extent of his official duties at the time he wrote the memorandum (R. 24), and that generally a job description does not outline fully the scope and extent of official duties for the job assigned because, in his opinion, promotion is based on how much he extended his job, job duties and upon how much additional work he took on (R. 24).

On June 30, 1960, respondent filed an Amended Answer in which he changed the date upon which his employment with the U. S. Information Agency allegedly began, from August 20, 1959 (as stated in his original Answer), to September 20, 1959, and in which he abandoned his contention that he had received no help whatsoever in the preparation and revision of the memorandum (as he had originally stated in his Answer and in his testimony on deposition), and in which he changed the position he had announced in his Answer, and in the testimony given upon deposition, to reflect the fact that he *had* disclosed the contents of the memorandum to his wife, to Mr. Smith, and to Mr. Clark (R. 25, 26).

On August 2, 1960, respondent filed an affidavit in which he flatly contradicted the testimony he had given on deposition with regard to receiving assistance in the preparation of the memorandum, stating that his recollection had been "refreshed", after he had testified on deposition, by being shown the original rough draft which he had earlier testified had been destroyed (R. 31, 32).

On July 13, 1960, petitioner testified, on deposition, that Robert Clark was her immediate supervisor and that Shelby Smith was the head of her section, and was her rating supervisor (R. 27).

On August 2, 1960, respondent filed a Motion for Summary Judgment (R. 29). Attached to this Motion were Affidavits executed by him (R. 31) and by the common supervisor of both parties, Shelby B. Smith.

On October 3, 1960, the District Court entered an Order denying respondent's Motion for Summary Judgment (R. 40).

On July 10, 1961, respondent filed a second Motion for Summary Judgment, grounded upon facts identical to those advanced in support of the Motion which had been denied by the District Court, *supra* (R. 40). Attached to this second Motion for Summary Judgment were two more Affidavits, one signed by Robert B. Clark (Mr. Smith's deputy) on June 23, 1961 (R. 42), and the other signed by G. Lewis Schmidt on June 26, 1961 (R. 41). Mr. Schmidt's Affidavit made reference to certain "official personnel records" of the "Agency" (R. 41), which "official personnel records" were never produced in the District Court.

On December 20, 1961, the District Court entered an Order granting respondent's Motion for Summary Judgment, and dismissing petitioner's Complaint (R. 42).

Jurisdiction over this case had been conferred upon the District Court by the District of Columbia Code, § 11-306.

## ARGUMENT

Petitioner seeks review upon the following contentions:

1. That the Court of Appeals has sanctioned a District Court departure from the accepted and usual course of judicial proceedings, in affirming a grant of summary judgment contrary to the then established law of the case, which requires an exercise of this Court's power of supervision;

2. That the Court of Appeals has sanctioned a District Court failure to give effect to Rule 56, Federal Rules of Civil Procedure, which requires an exercise of this Court's power of supervision;

3. That the Court of Appeals has sanctioned a District Court decision on a broad federal question, which decision conflicts with applicable decisions of this Court.

Petitioner will treat each of these assignments of error, *infra*, separately.

### I

### EARLIER DENIAL OF MOTION FOR SUMMARY JUDGMENT, BASED UPON SAME MATERIALS PRESENTED TO THE COURT IN SUBSEQUENT MOTION FOR SUMMARY JUDGMENT, ESTABLISHED LAW OF THE CASE, AND BARRED GRANTING OF THE LATER MOTION FOR SUMMARY JUDGMENT

In respondent's Motion for Summary Judgment filed on August 2, 1960, he argued that he was petitioner's supervisor, and as such, had an absolute privilege to write and publish the memoranda which gave rise to the liabilities sued upon. Respondent supported his argument with his affidavit, and his testimony on deposition, in both of which he claimed to be peti-

tioner's supervisor. He also filed an affidavit signed by Mr. Shelby B. Smith, the supervisor of the section in which both parties were employed, which contained a parenthetical remark, referring to the respondent, "(who *is* the immediate supervisor of the plaintiff, Pearl G. Martufi)." (Emphasis supplied.)[1]

Petitioner had earlier filed an affidavit on January 4, 1960, in which she denied that respondent had ever been her supervisor. Petitioner repeated this contention on deposition, when she identified Mr. Robert B. Clark as her immediate supervisor. With these materials before it, the District Court, on October 3, 1960, entered an Order denying respondent's motion for summary judgment.

This denial of respondent's first motion for summary judgment was a general denial and did not specify what facts were not controverted. Accordingly, all of the issues, as framed by the pleadings, remained open for trial. The denial of the first motion for summary judgment established the law of the case as to the legal points involved, namely, that there did exist genuine questions of fact relative to the occupa-

[1] It might be observed that Mr. Smith's affidavit is dated January 14, 1960. Respondent's Answer to the Complaint contains the statement, "that defendant Robert C. Fraser admits that from August 20, 1959, *until January 4, 1960*, he was the immediate supervisor of and shared an office with the plaintiff." Respondent's Amended Answer contains the statement, "that defendant Robert C. Fraser admits that from September 20, 1959 *until January 4, 1960*; he was the immediate supervisor of and shared an office with the plaintiff." The *January 4, 1960* alleged termination date of respondent's supervision of petitioner was also used by the respondent in his testimony on deposition on June 28, 1960. (R. 11) (Emphasis supplied.)

tional relationship of the parties and the scope of defendant's authority.[2]

Respondent's second motion presented grounds identical to those advanced in support of the denied motion. The only "new" materials presented to the Court in the second motion were two additional affidavits, neither of which contained an allegation of fact which had not been presented at the hearing on the denied motion; both were merely cumulative and simply buttressed facts already alleged. One of the affidavits (Clark), signed by a subordinate of an earlier affiant (Smith), contained absolutely no new material, and the other (Schmidt) completely disregarded the Rule 56(e) requirement that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."[3]

Moore,[4] in discussing Rule 56(e), states:

> "It is most important that copies of material documents accompany the affidavit, and Rule 56(e) requires that sworn or certified copies of all papers or parts thereto referred to in an affidavit, shall be attached thereto or served therewith. If the original document is material, the affidavit should state that it will be produced at the hearing. When a document is referred to in an affidavit, and the party making the reference does not have possession of it or of a copy, he should so state in the affidavit, describing it and stating when and where the affiant signed it, who has possession, and what efforts have been made to obtain a copy."

[2] 6 Moore's Federal Practice (2nd Ed.), § 56.20(2), § 56.14(2).

[3] Rule 56(e), F.R.C.P.

[4] 6 *Moore's Federal Practice* (2nd Ed.), § 56.22, p. 2334.

Respondent attempted to resolve his important claim of material fact that he was petitioner's supervisor. He referred to "official personnel records" in the Schmidt affidavit, but made no effort to produce the so-called "official personnel records". Mr. Schmidt's statements not only did not comply with the mandate of Rule 56(e), but equally important, constituted an effort by the defendant to introduce, in support of a motion which claimed an absence of genuine factual issues, inadmissible hearsay evidence. Accordingly, the District Court *could not* consider the Schmidt affidavit when determining whether or not there was an absence of genuine issues of material fact. The Schmidt affidavit should have been disregarded completely, and both affidavits, containing merely cumulative, repetitive material, should not have been interpreted as raising any issue which had not been presented to the District Court at the hearing on the first, denied motion.

Although additional evidence and testimony which establish a new basis for deciding a motion for summary judgment may properly form the basis for a renewal of such a motion, the Schmidt and Clark affidavits should not be considered to have produced any such additional evidence or testimony.

The usual criterion used in determining whether a departure from the prior-enunciated rule is warranted is to find whether the renewal motion is based upon the same or different grounds.[5] If the grounds are the same, important policy considerations have dictated that a Judge be prohibited from vacating, modifying, or departing from the prior adjudication of a motion which rests solely upon an identical compila-

[5] *Fraser* v. *Doing*, 76 U.S. App. D.C. 111, 117, 130 F. 2d 617.

tion of evidence." A departure from this rule encourages the unpleasant extravagance of permitting a litigant to set off one Judge against another (to the real or fancied advantage of his own cause), to create embarrassment, and to impose burden and delay upon the course of the litigation.

Although the doctrine of "the law of the case"[6] is flexible enough to permit a departure from the prior enunciated legal rule when warranted,[7] some good reason must be shown why the prior rule is no longer applicable and should be departed from. In his second motion for summary judgment respondent offered no good reason to show why the District Court's ruling no longer applied to the case. The denial of the first motion for summary judgment established the law of the case, opening and reserving all issues for trial, and a departure therefrom was not shown to be warranted. The District Court's Order granting respondent's motion for summary judgment was, therefore, a substantial and erroneous departure from the accepted and usual course of judicial proceedings, and should be reviewed by this Court.

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[6] *Collord* v. *Reconstruction Finance Corp.*, 103 F. Supp. 794 (1952); *In re Leathem Smith-Putnam Navigation Co.*, 11 F. Supp. 1006; *United States* v. *Bausch and Lomb*, 3 FRD 391.

[7] 6 *Moore's Federal Practice* (2nd Ed.), § 56.14(2).

## II

## EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT REGARDING OCCUPATIONAL RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT, AND SCOPE OF RESPONDENT'S AUTHORITY, BARRED GRANTING OF MOTION FOR SUMMARY JUDGMENT

The defense offered by respondent was that his preparation and distribution of the memoranda which petitioner alleges caused her to sustain damages, was absolutely privileged. An answer to the difficult question of whether a government employee should have absolute immunity from civil prosecution for what otherwise might constitute tortious, actionable conduct on his part, must be founded upon the following proposition: did the act which gave rise to the liabilities sued upon fall within the outer perimeter of matters committed by law to his supervision and control; and, if it did, should he, as a matter of policy, be granted absolute license to act, whatever the consequences might be to the rights of individual citizens, because of the relative importance of his role in the maintenance of an orderly and efficiently operating government service.[5]

The question of whether respondent's act fell within the outer perimeter of his duties is fundamentally a question of fact. In this case it is a question of greatly disputed fact. The respondent, in his Answer, Amended Answer, deposition, and affidavits, has contended both that he was petitioner's supervisor and that it was his responsibility to evaluate the petitioner's performance and adjustment in her job, and to report this evaluation to the person who supervised the work

[5] This latter question will be treated with more detail in the third section of this argument.

of both parties. Petitioner, on the other hand, by affidavit and deposition, has insisted that the respondent was not her supervisor, and that he was not commissioned with a responsibility to prepare and disseminate evaluations of her work. Thus, controlling issues of fact existed when respondent's second motion for summary judgment was heard, and the District Court improperly resolved these issues by granting respondent's motion.

These issues, in the context of this case, are neither fanciful nor formal. They are genuine issues because their resolution will determine whether respondent has any real basis for his assertion that he is entitled to absolute immunity from civil prosecution, on the ground that he was absolutely privileged to make the statements he did about petitioner.

Certain materials were offered by the respondent in support of his claim that he was petitioner's supervisor; other materials were offered by the petitioner which contradicted this claim. All inferences of fact from the proofs proffered at the hearing must be drawn against the moyant and in favor of the party opposing the motion.[9] In discharging his burden to establish clearly the non-existence of a genuine issue of fact the respondent was required to show both that his moving papers were true, and that, as true, they established the lack of such a triable issue of fact.[10]

When affidavits are used to support a motion for summary judgment the question of credibility is of the utmost importance, since the right to cross-examine

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[9] 6 *Moore's Federal Practice* (2nd Ed.) § 56.15 (p. 2125); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 8 L. ed. 2d 176.

[10] 6 *Moore's Federal Practice* (2nd Ed.) § 56.15(4) (p. 2133).

has been denied. The issue presented to the District Court in this case was basically an issue of credibility. Either the respondent was, or he was not, petitioner's supervisor; he claimed he was and the petitioner claimed he was not.

The contradictory positions observable in respondent's own pleadings, testimony and affidavits illustrate why "affidavits are the least satisfactory form of evidentiary materials upon which to base a Summary Judgment."[11]

Moreover, petitioner maintained, throughout, the consistent position that respondent was never her supervisor.

In *Sartor* v. *Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 64 S. Ct. 724, 88 L. ed. 967, Mr. Justice Jackson, speaking for the majority, stated:

> "Summary Judgment procedure does not contemplate a trial by affidavits. . . . It may well be that the weight of the evidence would be found on a trial to be with the defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner."

In this case, the District Court permitted the respondent to "swear" the petitioner out of Court, and the Court of Appeals sanctioned this procedure.

The effect of the District Court's Order was to resolve the dispute that the respondent was the petitioner's supervisor, and therefore had the right to com-

[11] 6 *Moore's Federal Practice* (2d Ed.) § 56.15(4) (p. 2135).

pose the memoranda complained of, as a matter of undisputed fact. This decision was made, and these issues were resolved, in the face of a flat denial by the petitioner that the respondent held such a position. Moreover, nowhere in the materials before the District Court did there appear, or was there offered by the respondent, any documentary evidence that respondent's job included a responsibility for preparing personnel reports. Indeed, respondent, on oral deposition, could not even recall what his "job description" encompassed. In fact, respondent offered nothing more than the bald assertion that he had a "clear duty to report to his supervisor", as support for his claim of right to summary judgment.

The Court of Appeals, in sanctioning the trial and resolution of factual issues by summary judgment procedure in the District Court, disregarded a mandate of Rule 56, Federal Rules of Civil Procedure; its judgment should be reviewed.

## III

## THE DISTRICT COURT MISAPPLIED LEADING AUTHORITIES IN EXTENDING GRANT OF EXECUTIVE PRIVILEGE TO ONE ACTING IN THE LOWEST ECHELON OF GOVERNMENT SERVICE WHO HAS OFFERED NO COMPETENT EVIDENCE TO SUPPORT HIS CLAIM OF RIGHT

In the District Court's Order granting respondent's motion for summary judgment, the Court relied upon the authority of *Barr* v. *Matteo*, 360 U.S. 564, *Preble* v. *Johnson*, 274 F. 2d 275, and *Cooper* v. *O'Connor*, 69 U.S. App. D.C. 100, 99 F. 2d 135, in deciding that the respondent was entitled to judgment as a matter of law. In order to ground its judgment upon these cases, the District Court was required to find that the prep-

aration of the memoranda by the respondent was a "matter committed by law to his control or supervision", and that the respondent was operating within the "outer perimeter" of his specific duties when he acted.

The effect of the District Court's finding would appear to be a destruction of the carefully balanced criteria, necessary to be met for the grant of privilege, established by this Court in *Barr* v. *Matteo, supra*. In effect, the District Court has blanketed several million federal employees with absolute immunity, the only proviso being that the act complained of was done during working hours. Since respondent was not required to prove, by objective evidence offered in the customary course, that the preparation of memoranda about the petitioner was a "matter committed by law to his control and supervision", this requirement set by this Court, "which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits,"[12] is reduced to impotence.

This broad and extended application of a decision of this Court, sanctioned by the Court of Appeals, should be reviewed.

Respectfully submitted,

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[12] *Barr* v. *Matteo, supra*.

## APPENDIX

### Statutes and Rules Involved

**Federal Rules of Civil Procedure:**

*Rule 56(b):*

"*Summary Judgment: For Defendant Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any party thereof."

*Rule 56 (c):*

"*Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

*Rule 56(e):*

"*Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

**§ 11-306, District of Columbia Code, 1961 Edition:**

"*General Jurisdiction.* Said courts shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States; and any one of the judges may hold a criminal court for the trial of crimes and offenses arising within the District."

**28 U.S.C. 1254:**

"*Courts of appeals; certiorari; appeal; certified questions.* Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

**28 U.S.C. 1291:**

"*Final Decisions of District Courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(Filed October 17, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1962

Civil 3438-59.

No. 16,855

PEARL G. MARTUPI, *Appellant*,

v.

ROBERT C. FRASER, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Wilbur K. Miller and Washington, Circuit Judges.

**Judgment**

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel for appellant and submitted on the brief for appellee.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: October 17, 1962

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3438-59

PEARL G. MARTUFI, *Plaintiff*,

v.

ROBERT C. FRASER, *Defendant*.

**Order**

Upon consideration of defendant's motion for summary judgment and of the opposition thereto and of argument of counsel, and it appearing that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, *Barr* v. *Matteo*, 360 U.S. 564; *Preble* v. *Johnson*, 275 F. 2d 275, *Cooper* v. *O'Connor*, 69 App. D.C. 100, 104, 99 F. 2d 135, 139, it is by the Court this 20th day of December, 1961

ORDERED that defendant's motion for summary judgment be and it hereby is granted, and that the complaint herein be and it hereby is dismissed with prejudice.

/s/ BURNITA SHELTON MATTHEWS
*United States District Judge*

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 745

PEARL G. MARTUFI, PETITIONER

*v.*

ROBERT C. FRASER

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court for the District of Columbia (Pet. App. 4a; R. 44[1]) is not reported. The *per curiam* order of the court of appeals affirming the judgment of the district court (Pet. App. 3a) is not reported.

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[1] All record references are to the Joint Appendix submitted in the court of appeals and filed in this Court pursuant to Rule 21.

## JURISDICTION

The judgment of the court of appeals was entered on October 17, 1962 (Pet. App. 3a). The petition for a writ of certiorari was filed on January 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court erred in ruling that the affidavits and other documents before it permitted the entry of summary judgment.

2. Whether the district court correctly held that respondent was immune from liability for damages under the rule of *Barr* v. *Matteo*, 360 U.S. 564, with regard to allegedly defamatory statements made by him in the course of his duties as an employee of the United States Information Agency.

## RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part:

### SUMMARY JUDGMENT

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(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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## STATEMENT

Petitioner, an employee of the United States Information Agency, brought this suit for damages against respondent, another employee of the agency, alleging that in November 1959 the latter had falsely and maliciously written and circulated defamatory statements concerning petitioner (R. 3-7).[1] The statements in question were contained in the preliminary and final drafts of a formal intra-office

[1] Petitioner also joined as a defendant to the action another employee, Margaret Disney (R. 1-7). However, petitioner subsequently consented to the entry of summary judgment in favor of defendant Disney (R. 31).

memorandum addressed to Mr. Shelby Smith, the chief of the section to which petitioner was assigned; they pertained to petitioner's capacity to perform her duties satisfactorily, closing with the recommendation that petitioner be replaced (R. 4-6, 35, 37-39). In his answer, as amended, respondent averred that he had made the statements, that they were true, and that they "were made by him in the course of and within the scope of his official duties as an employee of the United States Government and were and are absolutely privileged." (R. 25.)

The answer also asserted that respondent was "the immediate supervisor of and shared an office with" petitioner and that respondent had prepared the materials "in accordance with several previous requests by his supervisor, Mr. Shelby B. Smith, that he prepare a memorandum setting forth his views with respect to the work performance of [petitioner] and his recommendation with respect to her replacement * * *" (R. 26). An affidavit by Mr. Smith was submitted which contained assertions to the same effect (R. 35-36). Petitioner executed an affidavit in which she denied, *inter alia*, that respondent "exercises in any manner whatsoever supervisory authority in the course of [his] employment over [petitioner] in the course of her employment." (R. 8.)

Respondent also stated by answer and affidavit that he had shown the drafts of the memorandum only to Mr. Smith, to the deputy chief of the section, and to his wife, who had assisted him with the drafting (R. 25-26, 31-32; see also R. 32-33). Smith's affidavit asserted that he had disclosed the

contents of the memorandum only to his secretary, who retyped the document, and to certain other officials of the agency (R. 35-36). The document, in final form, was classified as "confidential" (R. 38). With the record in this posture, the district court (Holtzoff, J.) denied a motion for summary judgment filed by respondent (R. 40).

Subsequently, respondent filed a second motion for summary judgment, attaching thereto two additional affidavits (R. 40-43). The first, by Mr. G. Lewis Schmidt, the Assistant Director for Administration of the United States Information Agency, declared that, according to "[o]fficial personnel records of the Agency": Mr. Smith was chief of the section in the agency to which petitioner was assigned; Mr. Smith had, pursuant to his authority, designated respondent to be chief of the unit to which petitioner was assigned; and, therefore, respondent "was the immediate supervisor of [petitioner] and responsible for her work in the Unit" (R. 41-42). The other affidavit, by Mr. Robert B. Clark, the deputy chief of the section, affirmed that respondent had been designated chief of petitioner's unit, and added that he had explained to petitioner that respondent would be her supervisor (R. 42-43).

On the basis of this record, the district court (Matthews, J.) granted respondent's second motion for summary judgment, relying on *Barr* v. *Matteo*, 360 U.S. 564, and related cases (R. 44; Pet. App. 4a). On petitioner's appeal, the court of appeals affirmed, *per curiam* (Pet. App. 3a).

## ARGUMENT

The courts below were clearly correct in holding that the case was appropriate for disposition by summary judgment and that, under prior decisions of this Court, respondent's allegedly defamatory statements were absolutely privileged. Moreover, no questions of general importance are raised by the petition. Review by this Court is, therefore, not warranted.

1. Petitioner asserts, first, that Judge Matthews was precluded from granting summary judgment because Judge Holtzoff's denial of the earlier motion had "established the law of the case * * *, namely, that there did exist genuine questions of fact relative to the occupational relationship of the parties and the scope of defendant's authority" (Pet. 8-9). Petitioner urges, in this connection, that the two additional affidavits filed by respondent on the renewal of his motion constituted merely cumulative evidence, and thus added nothing material to the record which had been considered on the earlier motion (Pet. 9-10).

We submit that, even assuming the affidavits submitted on renewal of the motion had failed to present any new evidence, Judge Matthews could properly grant summary judgment despite Judge Holtzoff's earlier ruling. A ruling by one judge on a motion for summary judgment may be deemed to establish "the law of the case" only in the sense that a second judge will, as a matter of practice, generally adhere to it on a renewal of the motion. However,

the second judge unquestionably has the *power* to deviate from the decision of the first. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C.A. 2), certiorari dismissed, 352 U.S. 883; cf. *Messenger* v. *Anderson*, 225 U.S. 436, 444; *Bowles* v. *Wilke*, 175 F. 2d 35 (C.A. 7), certiorari denied, 338 U.S. 861. As the Court of Appeals for the Seventh Circuit aptly noted in a recent decision, "Obviously we cannot be expected to reverse a correct decision by one district judge simply because we find that it is contrary to a prior ruling by another district judge in the same case * * *" *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794, 797 (C.A. 7), certiorari denied, 368 U.S. 944.

Moreover, petitioner's assertion that the additional affidavits submitted on renewal of the motion for summary judgment offered no new basis for decision is incorrect. The affidavit of Mr. Schmidt, a high official of the administrative staff of the agency, could reasonably have been deemed by the court as furnishing the conclusive evidence on the question of whether respondent was the supervisor of petitioner in the hierarchy of the United States Information Agency (R. 41-42).[*] Since such additional evi-

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[*] Respondent was not, as petitioner contends (Pet. 9-10), required by Rule 56(e) of the Federal Rules of Civil Procedure, *supra*, p. 3, or by the rule precluding hearsay evidence, to produce the "[o]fficial personnel records" to which the Schmidt affidavit referred. The district court could properly determine that, under the circumstances, Mr. Schmidt's affirmation as to what the agency records contained was sufficient and competent. Cf. *Jefferson Construction Co.* v. *United States*, 283 F. 2d 265, 267 (C.A. 1), certiorari denied, 365 U.S. 835.

dence was proffered with the second motion for summary judgment, "law of the case" considerations were plainly inapplicable. *Allstate Finance Corp. v. Zimmerman*, 296 F. 2d 797, 799 (C.A. 5); *Beedy v. Washington Water Power Co.*, 238 F. 2d 123, 127 (C.A. 9).

Petitioner also argues (Pet. 12-15) that the district court erred in concluding that the crucial issue of fact raised by the pleadings—whether respondent had prepared the allegedly defamatory memorandum as a part of his official duties for the agency—had been resolved by the affidavits submitted, thus making the cause ripe for resolution by summary judgment. Cf. Rule 56(c), Federal Rules of Civil Procedure, *supra*, pp. 2-3.

We think it clear that the court's conclusion was correct. Three officials of the United States Information Agency including Mr. Schmidt, the agency's Assistant Director for Administration, unequivocally supported, by affidavit, respondent's claim that he was petitioner's supervisor (R. 35, 42, 43). As against this testimony, petitioner offered only her bare assertion that respondent "exercised" no supervisory authority over her work, and that he was not charged with the duty of evaluating her work performance (R. 8). This assertion by way of conclusion, on a matter regarding which petitioner was not competent to testify, could not raise a "genuine issue as to any material fact" so as to preclude the granting of the motion for summary judgment. *Preble v. Johnson*, 275 F. 2d 275 (C.A. 10); *Williams v. Kolb*, 145 F. 2d 344 (C.A.D.C.); *Bruce Construction*

*Corp.* v. *United States*, 242 F. 2d 873 (C.A. 5). As the affidavits established that respondent was petitioner's supervisor, the court was justified in holding that the former had prepared the memorandum evaluating petitioner's work performance and attitude in the fulfillment of his official duties.[1]

Furthermore, respondent's preparation of the memorandum was clearly shown to have been within the scope of his duties entirely apart from the question of whether he was petitioner's supervisor. It is undisputed that respondent shared an office with petitioner, that he was senior in grade to her, and that he prepared the memorandum in question only upon the express direction of an official having supervisory authority over both of them (R. 26, 35, 43). Respondent's statements concerning petitioner, having been "made internally in response to inquiries that on their face were manifestly proper," were within his authority, for purposes of invoking the privilege. *Preble* v. *Johnson*, *supra*, 275 F. 2d at 278; *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Newbury* v. *Love*, 242 F. 2d 372 (C.A.D.C.), certiorari denied, 355 U.S. 889.

2. Since the allegedly defamatory memorandum was prepared by respondent in the course of his official duties, he was immune from liability predicated thereon, under the rule announced in *Barr* v. *Matteo*, 360 U.S. 564. In the *Barr* case and a companion

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[1] Petitioner does not contend—as, indeed, she cannot (see *supra*, pp. 4-5)—that the memorandum was ever made public or was excessively circulated within the agency.

case, *Howard* v. *Lyons*, 360 U.S. 593, this Court declared that federal officials are absolutely privileged as against civil damage suits for defamation and kindred torts based on acts performed in the course of their duties. Application of the rule in the instant case plainly requires that respondent be held immune from liability resulting from the fulfillment of his obligations as an employee of the United States Information Agency.

Petitioner implies that respondent should not be fully protected by the privilege because his position was not a high ranking one within the governmental hierarchy (Pet. 15-16). But, as this Court recognized in the *Barr* case (360 U.S. at 572-574), the policy underlying the rule of immunity—that federal officers should be permitted to carry out their duties vigorously and effectively, free from the harassment of vindictive damage suits—does not admit of a distinction based on rank. The lower federal courts, also, have consistently deemed the privilege to be applicable without regard to the rank of the official concerned. See, *e.g.*, *Newbury* v. *Love*, 242 F. 2d 372 (C.A.D.C.), certiorari denied, 355 U.S. 889; *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921; *Sauber* v. *Gliedman*, 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906, *Bershad* v. *Wood*, 290 F. 2d 714 (C.A. 9); *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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